IN THE HIGH COURT OF BOMBAY AT GOA.

CRIMINAL REVISION APPLICATION NO. 7 OF 2003.

Shri Sayad Abdul Razac,
r/at Alto Betim,
Reis Magos, Goa. ... Applicant.

Versus

1. Smt. Nusrat Sultana
   Abdul Razak, r/at H.
   No. 442, Torsanzar,
   Margao.
2. State through Public
   Prosecutor. ... Respondents.

Mr. S.D. Lotlikar, Senior Advocate with Mr. A.D. Bhobe, Advocate for the Applicant.

Mr. S.G. Bhobe, Advocate under L.A.S. for Respondent No. 1.

Mr. S.N. Sardessai, Public Prosecutor for the Respondent No. 2/State.

Coram : P.V. HARDAS, J.

Date : 25th July 2003.

ORAL JUDGMENT.

The applicant/accused, who stands convicted for an offence punishable under Section 494 of the Indian Penal Code, by the Judgment of the learned Judicial Magistrate, First Class, at Margao, dated 4th December 2001, in Criminal Case No. 5/P/87/I and sentenced to suffer rigorous imprisonment for a period of 3 months and fine of Rs. 5,000/-, in default to undergo simple imprisonment for 2 months and confirmed by the IIIrd Assistant Sessions Judge, South Goa, Margao, by Judgment, dated 10th February 2003, in Criminal Appeal No. 4 of 2002, has filed this revision

challenging the aforesaid conviction and sentence.

2. The facts necessary for the decision of this Criminal Revision Application are stated hereunder:-

Respondent no. 1/original complainant filed the aforesaid Criminal Complaint case before the Judicial Magistrate, First Class, Margao, alleging therein that the applicant/original accused had performed a second marriage on 21st September 1986 with one Arifa daughter of Ghulam Husain Shaikh. In support of the aforesaid charge, the respondent no. 1/complainant examined herself as P.W.1 and Zubair Murglay as P.W.2. The complainant/P.W.1 in her evidence states that she was married to the applicant/accused on 13th August 1981 and the marriage was registered in the Office of the Civil Registrar, Margao, under Entry No. 1062/81 in the Marriage Registration Book of the year 1981. Exhibit P.W.1/A is the copy of the marriage certificate. She further states that at the time of the marriage the applicant/accused was residing at Aquem, Margao. After the marriage, the accused continued his employment at Abu Dhabi and, thereafter, the respondent no. 1/complainant went to Abu Dhabi and stayed with the accused for a period of 10 months. Since she was in the family way, she returned to Goa and was admitted in the hospital of Dr. Narcinva Naik at Aquem, where she

delivered a still-born child. She states that, thereafter, she went to Bombay but, could not join the accused because the mother of the accused had deliberately misplaced her passport. Since then, she is residing at Margao with her parents. Some time in the year 1985 the applicant/accused returned from Abu Dhabi and on his return to Aquem did not treat the complainant properly. On 21st April 1986, the accused sent a letter, which is at Exhibit P3, to the complainant. In that letter the accused is alleged to have stated that he has married one girl from Bombay. The respondent no. 1/complainant, thereafter, made inquiries and her inquiries revealed that the accused had, in fact, contracted a second marriage with one Arifa. She obtained the marriage certificate from the Office of one Kazi, which is at Exhibit P4. The English translation is at Exhibit P4-A. She has stated that when the accused contracted the second marriage, her marriage with the accused was not dissolved. In the cross-examination she denied the suggestion that the accused had not contracted a second marriage and that the certificate at Exhibit P4 was a false certificate.

3. The respondent no. 1/complainant examined P.W.2 Zubair. He states that his father, who is the Chief Kazi for Greater Bombay, had been served with a summons but, since he was 80 years old, he had deputed

P.W.2 Zubair to produce the necessary documents as directed in the summons. He had, accordingly, produced the original marriage register in which, at page 12, there was a registration of marriage between Sayed Abdul Razzak with Arifa daughter of Gulam Husain Shaikh. According to the register, the marriage was performed on 21st September 1986, at Central Railway Institute Hall, Byculla, Bombay, at 6.00 p.m.. He has produced the certificate at Exhibit PW2/A and the English Translation is at Exhibit PW2/B. In the cross-examination he has admitted that the signature on the marriage certificate was not put in his presence. He has also admitted that the signatures of the bridegroom and the bride were obtained by the Kazi on the register but, not in the presence of the Chief Kazi.

4. In his statement under Section 313 of the Code of Criminal Procedure, the accused has denied that he had issued the letter at Exhibit P3 and that he had contracted a second marriage as alleged.

5. The learned trial Court accepting the admission made by the accused in the said letter at Exhibit P3 and the certificate of marriage at Exhibit PW2/A convicted and sentenced the accused as aforestated. The learned lower appellate Court came to the conclusion that as the name of the bridegroom in the

said certificate was similar to the name of the applicant/accused, the said certificate referred to the applicant/accused. The learned lower appellate Court, at paragraph 26, then further observed that in the certificate a reference was made to a passport number and since the plea of the accused was that the said certificate did not pertain to him, it was for the applicant/accused to have led evidence to show that the passport number referred to in the said certificate did not pertain to the passport issued to him and, therefore, according to the learned lower appellate Court, the applicant/accused had failed to discharge the burden of proving his defence that the marriage certificate was not in respect of him.

6. Mr. Lotlikar, learned senior counsel appearing on behalf of the applicant/accused, has urged before me that the burden to establish that the accused had contracted a second marriage rested squarely on the complainant. P.W.2 Zubair is admittedly not a witness to the marriage. P.W.2 has only produced the original register on the basis of which the certificate at Exhibit PW2/A has been issued. Thus, it was for the prosecution to have established that it was the applicant/accused, who had got married to the person named in the said certificate. The complainant has failed to adduce the necessary evidence establishing the

nexus between the applicant/accused and the person stated to have got married as per the certificate. Both the Courts below, according to the learned counsel for the applicant/accused, have committed a serious error of law in holding that the accused had failed to discharge his burden of proving that the certificate did not relate to him. He next urged that mere admission by the applicant/accused of having contracted a marriage is no evidence or proof of the applicant/accused having performed a second marriage.

7. Mr. Bhobe, the learned counsel appearing on behalf of the respondent no. 1/complainant, has urged before me that the marriage certificate coupled with the admission of the applicant/accused is enough to prove beyond reasonable doubt the second marriage contracted by the applicant/accused.

8. An admission by the applicant/accused of second marriage is no proof of the fact that the applicant/accused has contracted a second marriage. The prosecution has to prove beyond reasonable doubt that the applicant/accused had contracted a second marriage in order to prove the offence punishable under Section 494 of the Indian Penal Code. Mere admission by the applicant/accused, therefore, of having contracted a second marriage is no proof of the fact of second

marriage. In the present case, the prosecution has examined P.W.2 Zubair and has produced on record a certificate at Exhibit PW2/A. The said certificate depicts that the persons named in the certificate had contracted a marriage on the date mentioned in the certificate. Apart from the question regarding the evidentiary value to be attached to the certificate, according to me, the prosecution has miserably failed to prove that the applicant/accused is the person, who had contracted the second marriage and the said certificate relates to the second marriage of the applicant/accused. There is no evidence tendered by the respondent no. 1/complainant to establish a link between the applicant/accused and the certificate of marriage produced by P.W.2 Zubair. In the absence of that, it would be hazardous to come to a conclusion merely on the basis of similarity of the name that the applicant/accused had contracted a second marriage on the date mentioned in the said certificate. Admittedly, neither P.W.1/complainant nor P.W.2 Zubair were witnesses to the marriage. Nothing prevented the respondent no. 1/complainant from examining the witnesses, who had attended the marriage, to prove that the applicant/accused had performed a second marriage on the date mentioned in the said certificate. The learned lower appellate Court was, therefore, not right in holding that the burden shifted to the applicant/accused

to establish that the certificate did not relate to him and on his failure to lead evidence in that behalf, the certificate conclusively established that it was the applicant/accused, who had contracted a second marriage. The said certificate refers to a passport number and, therefore, it was incumbent on the respondent no. 1/complainant to have led evidence to demonstrate that the passport issued to the applicant/accused tallied with the number stated in the said certificate. Burden cannot be cast on the applicant/accused to establish that the passport number referred to in the certificate is not the passport number of the passport issued to him. The prosecution had to cross the initial hurdle of establishing that the applicant/accused had contracted a second marriage and that the certificate related to the marriage performed by the applicant/accused. In other words, unless and until the prosecution had established by reliable and cogent evidence that the applicant/accused had performed the second marriage, a burden could not be cast on the applicant/accused to establish that the certificate did not relate to him. This being the position, the approach of the two Courts below is wholly perverse. The said certificate of marriage is the pivot of the prosecution case and once it is found that the prosecution has failed to connect the said certificate to the applicant/accused, the mere admission of the applicant/accused in the letter at

Exhibit P3 of having married a girl from Bombay cannot establish the offence under Section 494 of the Indian Penal Code against the applicant/accused. This is a case where the prosecution has miserably failed to prove that the applicant/accused had contracted a second marriage as alleged.

9. In view of the above discussion, I am of the considered opinion that this revision deserves to be allowed and the conviction and sentence, as passed against the applicant/accused, by the two Courts below deserves to be quashed and set aside.

10. Accordingly, Criminal Revision Application is allowed. The conviction and sentence passed against the applicant/accused for an offence punishable under Section 494 of the Indian Penal Code is, hereby, quashed and set aside and the applicant/accused is acquitted of the aforesaid charge.

(P.V. HARDAS)
JUDGE.

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